



IN THE
Supreme Court of the United States

October Term, 1976
No. 76-1091

Service of the within and receipt of a copy thereof is hereby admitted this day of April, A.D. 1977.

J. B. ROSE, FLORENCE ROSE and BROWNIE-ROSE CANDIES, INC.,

Petitioners,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, C. ERWIN PIPER, Individually and as City Administrative Officer of the City of Los Angeles, CHARLES LUCKMAN ASSOCIATES, CHARLES LUCKMAN and SAMUEL M. BURNETT,

Respondents.

Brief of Respondents Charles Luckman Associates, Charles Luckman and Samuel M. Burnett in Opposition to Petition for Writ of Certiorari.

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Opinions Below.

The Opinion of the Court of Appeal, Second Appellate District, State of California (Appendix A of Petition) is unreported. The Order of the Supreme Court of the State of California (Appendix B of Petition) denying petitioners' petition for a hearing is also unreported.

Jurisdiction.

The judgment of the California Court of Appeal was entered on August 20, 1976. The Order of the California Supreme Court denying the petition for a hearing was entered on October 21, 1976. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(3). Petitioners have erroneously petitioned for Writ of Certiorari to the California Supreme Court; even if appropriate, the Writ would be addressed to the California Court of Appeal.

Question Presented.

Whether a final judgment of condemnation entered in a California eminent domain proceeding, in which property owners appeared and vigorously contested the taking, precludes relitigation of the public use and Fourteenth Amendment due process issues which were raised or could have been raised in that action, by reason of the California doctrines of collateral estoppel and *res judicata*.

Constitutional Provision Involved.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[Petitioners erroneously cite the Fifth Amendment as the Constitution's relevant provision (Petition, p. 3).]

Statement of the Case.

On May 14, 1968, the City of Los Angeles filed a Complaint in Condemnation [Clerk's Transcript (hereinafter cited as "C.T."), pp. 11-59] in the Los Angeles Superior Court, Action No. 932216. The City sought to condemn certain parcels of land for use in connection with the Los Angeles Convention Center project, including two parcels owned by petitioners, who were named and served as defendants.

Petitioners appeared in the condemnation action and vigorously opposed the taking of their property. Petitioners filed an Answer [C.T., pp. 60-64] and affirmatively alleged, *inter alia*, that the City did not intend to use the subject property for a public use and that the taking was not necessary to a public use. The Court conducted a full evidentiary trial on the public use issue on April 18 and April 21, 1969. Both the City and petitioners fully briefed the Court on the public use issue [C.T., pp. 79-101]. Petitioners contended at the trial that the City did not intend to use the land for a public use, and attempted to prove that it actually intended to sell the land for profit to private developers for use as a hotel and office building. Petitioners further contended that the condemnation of their property violated due process of law under the Fourteenth Amendment [C.T., pp. 82-83].

After a full trial on the public use issue, at which petitioners appeared personally, the Court rejected petitioners' contentions and held that the use for which the subject property was taken was a public use authorized by law [C.T., pp. 102-103]. Subsequently, the Court conducted a separate trial on the issue of valuation and on December 19, 1969, entered a Judgment

of Condemnation after trial [C.T., pp. 104-110]. Petitioners did not appeal from that Judgment, and it thus became final on or about February 25, 1970.

On November 3, 1972, petitioners filed a new and separate Complaint in Los Angeles Superior Court, Action No. 42538, to recover damages arising from the alleged wrongful and fraudulent condemnation of their land. They named as defendants in this fraud action the City of Los Angeles; Dr. C. Erwin Piper, Chief Administrative Officer of the City; Charles Luckman Associates ("CLA"), architects for the Convention Center project; Charles Luckman, President of CLA; and Samuel M. Burnett, Project Architect for CLA (CLA, Charles Luckman and Samuel M. Burnett are hereinafter referred to as "the Luckman defendants").

After successive demurrers to the original Complaint, the First Amended Complaint and the Second Amended Complaint had all been sustained with leave to amend, petitioners filed their Third Amended Complaint on June 28, 1974 [C.T., pp. 225-233]. The Third Amended Complaint in the fraud action contained two separate causes of action; the first covered the Luckman defendants, the City and Dr. Piper, and the second covered only the latter two defendants.

In the fraud action's first claim, petitioners alleged that the City, Dr. Piper and the Luckman defendants conspired to wrongfully condemn the subject property. They also alleged that the property was not intended to be used for a public use, but was intended to be used as the site for a future hotel and trade center. They further alleged that the condemnation violated due process under the Fourteenth Amendment [Third Amended Complaint, paragraphs 12-14 and 34;

C.T., pp. 226-231]. *These were precisely the same allegations which petitioners made as defendants in the condemnation action.* [C.T., pp. 82-89].

In the first cause of action, petitioners also alleged that Dr. Piper and the Luckman defendants were to share in the profits from the construction, development and operation of the hotel and trade center. Moreover, they alleged that defendants had testified falsely at the condemnation trial concerning the intended public use of the property, and concealed the true facts relating to the private development. Petitioners sought the restoration of the property or, alternatively, compensatory damages of \$826,800.00 representing the alleged difference between the condemnation award and the present market value of the parcels involved, and also sought to recover punitive damages in the sum of \$1,000,000.00.

The Luckman defendants demurred to the fraud action's first cause of action; defendants City of Los Angeles and Dr. Piper separately demurred to the first and second causes of action. The Luckman defendants categorically denied, and continue to deny, the allegations relating to perjury and concealment of evidence. However, the Court was constrained, pursuant to standard California law and motion practice, to treat the allegations as true for the purpose of the demurrers. Respondents based the demurrers to the first cause of action upon the defenses of collateral estoppel and *res judicata*. Respondents contended that petitioners had already litigated the public use and Fourteenth Amendment issues in the condemnation action, and that these issues had been decided adversely to them. Since the public use and due process issues were essential elements of the fraud action's first cause

of action, respondents asserted that under California law the prior adjudication, which had become final, barred the fraud action. After respondents filed their demurrers and prior to hearing, petitioners filed a motion for an evidentiary hearing and attached as exhibits voluminous documents in an attempt to place before the Court matters outside the pleadings [C.T., pp. 274-1295].

On December 20, 1974, the Court sustained the demurrers of all defendants without leave to amend on the grounds asserted, and denied petitioners' motion for an evidentiary hearing. The Order of Dismissal [C.T., p. 1320] was filed on December 20, 1974, and petitioners filed a Notice of Appeal in the California Court of Appeal on February 11, 1975 [C.T., p. 1322].

The Court of Appeal, by its decision filed August 20, 1976, affirmed the judgment (Order of Dismissal) of the Superior Court in the fraud action on the grounds of collateral estoppel and *res judicata*. By its Order filed October 21, 1976, the California Supreme Court denied the petition for a hearing.

Petitioners filed a second and different collateral attack on the condemnation action on April 29, 1975, in the United States District Court for the Central District of California, Case No. CV 75-1461-DWW. This was a purported class action brought on behalf of all property owners whose property had been condemned as part of the Los Angeles Convention Center project. Except for allegations regarding federal jurisdiction and the purported class action, the Complaint was virtually identical to the state court fraud action, and it included the Luckman defendants as named

defendants. The Complaint purported to state federal claims for relief under the Civil Rights Act, 42 U.S.C. §1983, and the Fourteenth Amendment for a taking of property without due process of law. Respondents filed motions to dismiss the Complaint on the ground that the condemnation action under California law was collateral estoppel and *res judicata* on all of the public use and other issues in the Complaint. The District Court, by Order dated August 7, 1975 (Appendix A hereto), granted these motions and dismissed the Complaint on the grounds of collateral estoppel and *res judicata*. Petitioners have appealed such dismissal to the Ninth Circuit Court of Appeals; this appeal is still pending.

REASONS FOR DENYING THE WRIT.

I.

THE PETITION SEEKS REVIEW OF A STATE COURT DECISION WHICH IS BASED ON ADEQUATE STATE LAW GROUNDS, AND THUS PRESENTS NO FEDERAL QUESTION WHICH MERITS SUPREME COURT REVIEW.

The only issue of any possible validity raised by the Petition is one question of California law decided by the California Court of Appeal. This is the question whether the doctrines of collateral estoppel or *res judicata* bar petitioners' collateral fraud action and their attempt to relitigate the alleged Fourteenth Amendment violations in the condemnation action.¹ However, the United States Supreme Court has consistently followed its self-adopted rule, which is fully applicable to the present case, that it will not review a state court judgment that is based upon an adequate nonfederal ground. The rule is applicable whether or not the state court judgment also relies on a federal ground, and whether or not the state court has wrongly decided the federal issue.

Murdoch v. Memphis, 20 Wall. (U.S.) 590, 636 (1875);

Berea College v. Kent, 211 U.S. 45, 53 (1908);
and

Fox Film Corporation v. Muller, 296 U.S. 207 (1935).

¹It is significant that petitioners make no claim that the Court of Appeal's application of the doctrines in and of itself constituted a violation of due process rights guaranteed by the Fourteenth Amendment.

In *Herb v. Pitcairn*, 324 U.S. 117 (1945), the Supreme Court explained both the vintage and the imperative reasons behind this rule:

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted]. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." 324 U.S. at 125-126.

In *Wood v. Chesborough*, 228 U.S. 672 (1913), the Supreme Court, in a case involving alleged violations of due process rights under the Fourteenth Amendment, dismissed a writ of error to review the judgment of a state Supreme Court which was based on statute of limitations and laches issues. The Court further explained the paramount importance of its rule:

"[i]t is well established that if there be Federal and Non-Federal grounds, and the latter be sufficient to support the judgment of the state court, then there can be no review by this court . . . if we should assert a power of review in

such case we could exercise like power in all cases where Federal questions are set up and substitute our judgment for the judgment of the state courts as to the state laws." [Emphasis added]. 228 U.S. at 677-680.

See also, *Cramp v. Board of Public Instruction*, 368 U.S. 278, 281 (1961); *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487, 489 (1965).

The Supreme Court has specifically held, under this rule, that it deems *res judicata* an adequate nonfederal ground, and that it will not review a final state court decision which is based on the doctrine of *res judicata*. In *Northern Pacific Railroad Company v. Ellis*, 144 U.S. 458 (1892), the Supreme Court, in refusing to review a judgment of the Wisconsin Supreme Court that was based on *res judicata*, stated:

"The decision of the Supreme Court of Wisconsin rested upon an independent ground not involving a Federal question and broad enough to maintain the judgment . . ."

"Under these circumstances the judgment of the Supreme Court is not subject to review here." 144 U.S. at 464-65.

In *Rio Grande Western Railway Company v. Stringham*, 239 U.S. 44 (1915), the Supreme Court, in again refusing to review the judgment of a state Supreme Court that was based on *res judicata*, held:

"And as the question sought to be presented arises upon the first judgment . . . it is apparent that the writ of error addressed to the second

judgment presents nothing reviewable here [citations]." 239 U.S. at 47.

As stated above, the Petition raises only one arguably viable question of law, and it is a question of state law: whether the California Court of Appeal erred in holding that under California law the doctrines of collateral estoppel and *res judicata* barred the fraud action. If this Court departed from its well-established rule, accepted the Petition and ruled that the Court of Appeal did so err, it nevertheless would not reach the federal question of whether the condemnation judgment violated due process rights guaranteed by the Fourteenth Amendment. Instead, it would no doubt direct the Court of Appeal to reconsider the demurrer to the Complaint in the fraud action in light of the nonapplicability of collateral estoppel and *res judicata*. If the Supreme Court proceeded further, it would be forced to render an advisory opinion on the issue of whether the fraud complaint stated a cause of action for violation of Fourteenth Amendment rights, or for violation of any other rights, federal or state. The Supreme Court has properly and steadfastly refused to render such advisory opinions.

Herb v. Pitcairn, 324 U.S. 117 (1945);

Fox Film Corporation v. Miller, 296 U.S. 207 (1935); and

Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

II.

THE PETITION SEEKS REVIEW OF A CALIFORNIA COURT OF APPEAL DECISION WHICH IS MANIFESTLY CORRECT. IT THUS PRESENTS NO QUESTION, FEDERAL OR STATE, WHICH MERITS SUPREME COURT REVIEW.

A. The California Court of Appeal Correctly Applied Collateral Estoppel in the Fraud Action Against Petitioners on the Issue of Public Use.

Under the California doctrine of collateral estoppel, once an issue has been raised, fully litigated on the merits and adjudicated by a final judgment in one action, the first judgment operates as an estoppel or conclusive adjudication as to such issue in any subsequent action.

Teitelbaum Furs, Inc. v. Dominion Ins. Co.,
58 Cal.2d 601, 604 (1962);

Bernhard v. Bank of America, 19 Cal.2d 807,
810-11 (1942);

Todhunter v. Smith, 219 Cal. 690, 694-95
(1934); and

Berry v. Santa Barbara, 248 Cal.App.2d 438,
445 (1967).

The California Supreme Court forcefully stated the rule of collateral estoppel in the leading case of *Bernhard v. Bank of America*, *supra*, which was followed by the Ninth Circuit in *Clark v. Watchie*, 513 F.2d 994 (9th Cir. 1975), and cited with approval by this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971):

"The doctrine of *res judicata* precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of

competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. The doctrine also serves to protect persons from being twice vexed for the same cause." [Citations omitted]. 19 Cal.2d at 810-11.

In general, courts have considered three factors in determining whether to apply collateral estoppel in a particular case:

1. Whether the issue decided in the prior adjudication was identical to the one presented in the action in question;
2. Whether there was a final judgment on the merits in the prior adjudication; and
3. Whether the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication.

Bernhard v. Bank of America, 19 Cal.2d 807
(1942);

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971);
and

Clark v. Watchie, 513 F.2d 994 (9th Cir.
1975).

All of the criteria for the application of the doctrine of collateral estoppel are present in the instant case.

1. Identity of Issues.

The basis of the fraud action's first cause of action was the allegation that petitioners' property was wrongfully condemned for public use when, in fact, the City did not intend to use the property for public use. Petitioners alleged that the property was intended to be sold to private developers for use as a future hotel and trade center. Accordingly, an essential element of the first cause of action was exactly the same as in the condemnation action—that the City intended to resell the land to private developers and that this did not constitute a public use. However, petitioners had already fully litigated the issue of public use and this issue had been decided adversely to them in the condemnation action.

The Petition discusses at length the concept of "excess condemnation" and asserts that no justification existed for the excess condemnation which allegedly occurred in the condemnation action (pp. 5-14). The excess condemnation issue is, however, merely part of the public use issue. Although "excess condemnation" is not a precise legal term, it generally refers to any taking of property not physically necessary for a public improvement. See Matheson, *Excess Condemnation in California: Proposals for Statutory and Constitutional Change*, 42 So.Cal.L.Rev. 421 (1969). In the fraud action, petitioners alleged that the City condemned more property than it needed for street widening and that it intended to use the excess property for private purposes; petitioners did allege, therefore, an excess condemnation. However, the impropriety of such excess condemnation was part of the public use issue litigated in the condemnation action, since petitioners alleged in the fraud action that the excess property was not intended to be devoted to a public use. See *People*

ex rel. Dept. of Pub. Wks. v. Lagiss, 223 Cal.App.2d 23, 41 (1963); Matheson, *supra*, at 425-27.

2. Final Judgment on the Merits.

The Petition acknowledges that the Judgment in the condemnation action became final (p. 4). It is also clear that the issue was determined on its merits, since the public use question was decided after a full trial during which the Court received both oral and documentary evidence. Petitioners elected not to appeal the condemnation judgment.

3. Petitioners Were Parties Defendant in the Condemnation Proceedings.

The pleadings in the condemnation action establish that petitioners were defendants, appeared in the action and were fully represented by counsel at trial. Accordingly, petitioners are bound by the determination of the public use issue in the condemnation action.

The fact that the Luckman defendants were not parties to the condemnation action does not, as the Petition suggests (p. 19), preclude their invocation of the doctrine of collateral estoppel. Increasingly over the last thirty years, the use of collateral estoppel in both state and federal courts has ceased to depend upon the artificial doctrine of mutuality. The modern trend has been to preclude a party from relitigating an issue decided against him in a prior action, even if the party asserting the estoppel was a stranger to the first suit.

Bernhard v. Bank of America, 19 Cal.2d 807 (1942);

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) and;

United Air Lines, Inc. v. Wiener, 335 F.2d 379, 424 (9th Cir.), cert. dis. 379 U.S. 951 (1964).

The case cited by petitioners (pp. 19-20), *Great Western Furniture Co. v. Porter Corp.*, 238 Cal.App.2d 502 (1965), does not hold that a party invoking the doctrine of collateral estoppel must have been a party or in privity with a party to the prior action. The case merely holds that where two parties were co-defendants and not adversaries in one action, neither may assert the doctrine of *res judicata* against the other in a subsequent action in which they are adversaries. The *Porter* case is certainly not contrary to *Bernhard*, which never has been overruled or modified, and is still the law.

See, e.g., *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.*, 24 Cal.App.3d 410, 417 (1972).

Furthermore, the *Bernhard* rule has never been limited by any California case to situations in which the party against whom the doctrine is asserted was plaintiff, or otherwise had the initiative, in the prior action. The theory expounded by Professor Currie in his article on collateral estoppel cited by petitioners (pp. 20-21), 9 Stan.L.Rev. 281 (1957), was recanted by him in *Civil Procedure: The Tempest Brews*, 52 Cal.L.Rev. 25 (1965), and has never been adopted by the California courts. To the contrary, the *Bernhard* case has been applied to situations in which the party against whom the plea is asserted was the defendant in the prior action.

Miller v. City of Bakersfield, 256 Cal.App.2d 820 (1967).

B. The California Court of Appeal Correctly Applied Res Judicata in the Fraud Action Against Petitioners on the Issue of the Constitutionality of the Taking.

In addition to constituting collateral estoppel on the issue of public use, the judgment in condemnation was also *res judicata* on the entire question of the constitutionality of the taking.²

Petitioners' fraud action and the condemnation action were based upon the same claims. The primary right involved in each case was the same—to own or hold property free from unlawful interference. Similarly, the delict or wrong alleged in each case was the same—the unconstitutional taking of petitioners' property. Since the claims were the same, the judgment of condemnation was conclusive as to all substantive and procedural matters which were raised, or which might have been raised, in the condemnation action regarding the constitutionality of the taking. Petitioners' collateral attack on the judgment of condemnation was therefore barred by the principle of *res judicata* under California law, which is identical to the federal law in this area.

Bernhard v. Bank of America, 19 Cal.2d 807 (1942);

²The doctrine of *res judicata* is a concept related to, but distinct from, the doctrine of collateral estoppel. *Res judicata* precludes litigation not only of issues actually raised and litigated in the prior action, but also all issues which *might* have been raised. *Res judicata* does, however, require that the causes of action must be the same in both cases. Collateral estoppel, on the other hand, applies only to issues actually litigated in the prior action; however, it may also be applied if the second suit is based upon a different cause of action than the first suit. See generally, 1B Moore's Federal Practice, §0.441 at pp. 3771-74 (2d ed. 1974). In petitioners' fraud action, both the doctrines of *res judicata* and collateral estoppel are applicable because there is an identity of issues as well as an identity of causes of action between the condemnation action and the fraud action.

Brown v. Georgia Power Co., 371 F.Supp. 543 (S.D. Ga. 1973), *aff'd* 491 F.2d 117 (5th Cir.), *cert. den.* 419 U.S. 838 (1974); and *Hilliard v. Pennsylvania*, 308 F.Supp. 756 (W.D. Pa. 1970), *aff'd on other grounds*, 438 F.2d 92 (3d Cir. 1971).

On the basis of the California law of *res judicata*, petitioners are foreclosed from further litigating any constitutional issues, including the due process issue under the Fourteenth Amendment, with respect to the taking of their property. Such issues should have been, and in fact were, raised in the condemnation action. If petitioners were dissatisfied with the decision of or procedures utilized by the Superior Court in the condemnation proceeding, they had the right to raise any constitutional questions in the California appellate courts with possible ultimate review by the United States Supreme Court. Since they chose not to do so, their litigiousness should end.

C. The Judgment in the Condemnation Action Is Not Subject to Collateral Attack on the Ground of Extrinsic Fraud.

Petitioners in the fraud action were in essence attempting to recover damages resulting from the alleged procurement of a judgment by fraud and perjury. Although some authority exists for the granting of equitable relief in an action to set aside a judgment obtained by fraud, it is clear that such relief may be granted only in case of *extrinsic*, as opposed to *intrinsic*, fraud or mistake.

Kulchar v. Kulchar, 1 Cal.3d 467, 471-73 (1969);

Jorgensen v. Jorgensen, 32 Cal.2d 13, 18-19 (1948);
Gale v. Witt, 31 Cal.2d 362, 366 (1948);
and
Kachig v. Boothe, 22 Cal.App.3d 626, 632-33 (1971).

The California Supreme Court recently explained the distinction between extrinsic and intrinsic fraud in *Kulchar v. Kulchar*, *supra*, stating:

"Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.' (3 Witkin, Cal. Procedure, p. 2124.) 'Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; . . . —these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.' (United States v. Throckmorton (1878) 98 U.S. 61, 65-66 [25 L.Ed. 93, 95].)

* * *

"Relief is denied, however, if a party has been given notice of an action and has not been pre-

vented from participating therein. He has had an opportunity to present his case to the court and to protect himself from mistake or from any fraud attempted by his adversary. . . . Courts deny relief, therefore, when the fraud or mistake is 'intrinsic'; that is, when it 'goes to the merits of the prior proceedings, which should have been guarded against by the plaintiff at that time.'" 1 Cal.3d at 471-73.

Once a party has had an opportunity to cope with alleged fraud in an adversary proceeding, and a chance to fully develop and present his case at trial and on appeal, he must be content to abide the result. Otherwise, no judgment would ever be final; no litigation would ever be brought to a close. *Kachig v. Boothe*, 22 Cal.App.3d 626, 632 (1971).

The fraud alleged by petitioners in the fraud action consists essentially of asserted perjury and concealment of evidence in the previous condemnation case. It is thus intrinsic rather than extrinsic. As the Petition states (p. 22):

"The gravamen of the Petitioners' cause of action is that as a consequence of the fraud practiced by the demurring Respondents, that is the perjury and concealment of the true facts, the Petitioners were effectively denied their day in Court."

1. The Perjury and Concealment of Evidence Alleged by Petitioners Constitute Intrinsic Fraud.

In California, it is established law that perjured testimony at trial constitutes intrinsic rather than extrinsic fraud.

Kachig v. Boothe, 22 Cal.App.3d 626, 633 (1971);

Smith v. Great Lakes Airlines, Inc., 242 Cal. App.2d 23, 27 (1966); and
Robinson v. Robinson, 198 Cal.App.2d 193, 196-97 (1961).

Even in cases where the perjured testimony constitutes a repetition of lies previously told to the losing party outside the courtroom, the fraud is still intrinsic.

Smith v. Great Lakes Airlines, Inc., 242 Cal. App.2d 23, 27 (1966).

The California courts similarly hold that concealment or suppression of material evidence in a litigated case is intrinsic fraud and not grounds to set aside a judgment.

Kachig v. Boothe, 22 Cal.App.3d 626, 634 (1971).

2. An Action for Damages for Alleged Procurement of a Judgment by Fraud or Perjured Testimony Is an Impermissible Collateral Attack.

The California courts have uniformly held that the procurement of a litigated judgment by means of fraud or perjured testimony does not give rise to a later cause of action for damages for the fraud, since such an action would constitute an impermissible collateral attack upon the judgment.

Kachig v. Boothe, 22 Cal.App.3d 626, 636 (1971);

Agnew v. Parks, 172 Cal.App.2d 756, 765 (1959);

McLaughlin v. McLaughlin, 159 Cal.App.2d 287, 292-93 (1958); and

Thiriot v. Santa Clara etc. School Dist., 128 Cal.App.2d 548, 549-51 (1954).

3. Applicable Condemnation Cases.

In numerous California cases, almost identical to the present case, plaintiffs have sought without success to set aside judgments of condemnation alleged to have been obtained by fraud. The courts have uniformly held that the alleged fraud was intrinsic and concluded that plaintiffs were collaterally estopped to attack the judgment in the condemnation action.

Capron v. State of California, 247 Cal.App. 2d 212, 225-27 (1966);

Hamacher v. People, 214 Cal.App.2d 180, 182-83 (1963);

Thiriot v. Santa Clara etc. School Dist., 128 Cal.App.2d 548, 550-51 (1954); and

Beistline v. City of San Diego, 256 F.2d 421, 424 (9th Cir.), cert. den. 358 U.S. 865 (1958).

In *Beistline*, *supra*, plaintiff sought to rescind a sale of property made to the city of San Diego after the City had filed suit to condemn the property for use as a municipal airport. Plaintiff alleged that the City falsely represented the intended use of the property, that the representations were knowingly false, and that the City later sold the property to a private party at a considerable profit. Plaintiff alleged federal jurisdiction on the grounds that a substantial federal question was involved in that the state took his property without due process of law. In reviewing a motion to dismiss, the Ninth Circuit found that no deprivation of due process was alleged and that the requisite subject matter jurisdiction was lacking:

"Here, the language quoted in the Thiriot case, *supra*, is directly in point because of the factual

similarity in the two cases. There, the California court said the fraud alleged pertained to one of the main issues in any condemnation suit, the necessity of the taking for a use authorized by law. West's Ann. Cal. Code Civ. Proc. §1241. The court then pointed out that the fraud charged must be extrinsic or collateral fraud. No suggestion of extrinsic fraud is here pleaded." 256 F.2d at 424.

4. No Fiduciary Relationship Exists in This Case.

Petitioners have attempted to avoid the effect of the principles relating to intrinsic fraud by alleging that a fiduciary relationship existed between petitioners and respondents [Third Amended Complaint, paragraphs 22-25; C.T., pp. 229-30]. A review of the allegations discloses that they are conclusionary and without factual support, and are therefore insufficient to establish a confidential or fiduciary relationship in a condemnation case.

Hayward Union etc. School Dist. v. Madrid, 234 Cal.App.2d 100, 124 (1965).

Under California law, petitioners' bare legal conclusions are not admitted on demurrer and should be disregarded.

Zumbrun v. University of Southern California, 25 Cal.App.3d 1, 13-14 (1972).

Similarly, no facts have been pleaded against respondents which demonstrate that they occupied a "fiduciary" position or a confidential or trust relationship to petitioners. To the contrary, California cases hold unequivocally that no fiduciary relationship exists be-

tween a governmental agency, as condemnor, and a condemnee.

Capron v. State of California, 247 Cal.App.2d 212, 226 (1966); and

Thiriot v. Santa Clara etc. School Dist., 128 Cal.App.2d 548, 551 n. 3 (1954).

Since the City did not have a fiduciary relationship to appellants, it follows that the Luckman defendants, who were one or two steps removed, also did not have such a relationship.

5. The Cases Cited by Petitioners Are Inapplicable.

Petitioners cite several cases in support of their assertion that an exception exists to the rule of collateral estoppel where an injustice might result (pp. 24-31). None are on point.

The primary basis of the Court of Appeal's holding in *Timmsen v. Forest E. Olson, Inc.*, 6 Cal.App.3d 860 (1970), was the lack of identity of issues with the prior suit. Furthermore, the *dictum* in *Timmsen* to the effect that the doctrine of collateral estoppel might not be applied where grave injustice would result was derived from a prior case, *United States Fire Ins. Co. v. Johansen*, 270 Cal.App.2d 824 (1969), which in turn relied upon Section 70 of the *California Restatement Judgments*. *Cochran v. Union Lumber Co.*, 26 Cal.App.3d 423 (1972), also relied on Section 70 of the *California Restatement Judgments*.

An examination of Section 70 demonstrates that the exception to the doctrine of collateral estoppel is limited to *questions of law*. In the instant case, the public use issue was a question of fact determined adversely to petitioners in the condemnation action.

Thus, the cases cited by petitioners do not support the proposition that the doctrine of collateral estoppel should not be applied to the public use issue of fact in the instant case.

In every case seeking to set aside a judgment on the grounds of fraud or perjury, a danger exists that some injustice may result from applying the doctrine of collateral estoppel. This danger is, however, outweighed by the important public policies in favor of finality to litigation. As the Court of Appeal aptly stated in *Kachig v. Boothe, supra*:

"[W]e recognize that the wrong in this case is a most grievous one, and we should be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse. Reluctance on the part of witnesses to testify for fear of subsequent harassment by unfounded claims of perjury or endless litigation in which nothing was ever finally determined would be worse than occasional miscarriages of justice." 22 Cal.App.3d at 642.

Petitioners also cite *Pentz v. Kuppinger*, 31 Cal.App. 3d 590 (1973). The *Pentz* case, however, bears no resemblance to the fraud action. Petitioners incorrectly assert that *Pentz* is a non-fiduciary case. On the contrary, California courts have held that suits between spouses are fiduciary in nature and have made exceptions to the usual rules regarding extrinsic fraud in such cases. *Jorgensen v. Jorgensen*, 32 Cal.2d 13, 19-21 (1948). It is important to note that the judgment collaterally attacked in *Pentz* was a Mexican judgment. Not surprisingly, California courts are much less hesitant to grant relief to a party from the judgment

of a foreign country where the procedural safeguards do not compare with those of the United States courts and the standards of justice may be questionable.

Finally, petitioners rely upon a line of cases, commencing with *Mooney v. Holohan*, 294 U.S. 103 (1935), for the proposition that the alleged infidelity of the City in the condemnation action deprived them of due process and that such deprivation can be remedied by a collateral attack (p. 32). These cases are, of course, criminal and their rationale has never been extended to condemnation cases which are civil in nature. In fact, the Ninth Circuit held in *Beistline v. City of San Diego*, 256 F.2d 421, 424 (9th Cir. 1958), discussed *supra*, that the allegations of fraud on the part of the condemning authority were insufficient to state a claim for deprivation of due process under the United States Constitution.

D. A Legislative Determination of Public Necessity Is Conclusive and This Issue Is Non-Justiciable Even in the Face of Allegations of Fraud, Bad Faith or Abuse of Discretion.

1. The Issue of Public Necessity Is Different Than the Issue of Public Use.

The only two requirements under the California Constitution and the Fourteenth Amendment to the United States Constitution for the exercise of the right of eminent domain are (1) that the taking be for a public use and (2) that just compensation be paid for the taking.

People v. Chevalier, 52 Cal.2d 299, 304 (1959); and

Chicago, Burlington and Quincy Railroad Company v. Chicago, 166 U.S. 226 (1897).

In addition to these constitutional requirements, the California Code of Civil Procedure, Section 1241, in effect during the relevant period, contained certain further statutory requirements in eminent domain proceedings and required that the taking be necessary to the public use. The statute specifically provided that a valid city ordinance determining public necessity "shall be conclusive evidence" of the public necessity. The conclusive effect of the statute has led the California courts to treat the issue of public necessity as nonjusticiable, even where the action of the legislative body was motivated by fraud.

People v. Chevalier, 52 Cal.2d 299, 307 (1959).

It is important to distinguish the concepts of "public necessity" and "public use" in condemnation proceedings. "Public use" pertains to the character of the use and the purpose of the acquisition. "Public necessity" assumes a public use and is concerned with the extent of the use and the necessity of devoting the particular property to that use.

People v. Chevalier, 52 Cal.2d 299, 307 (1959); and

People ex rel. Dept. of Pub. Wks. v. Lagiss, 223 Cal.App.2d 23, 38-39 (1963).

The substance of the allegations of the fraud complaint was that the City did not really intend to use the land for the public purposes stated in the ordinance, but in fact intended to sell the property to private developers for a profit [Third Amended Complaint, paragraphs 12-14; C.T., pp. 226-28]. This defense arises under the issue of "public use." It was, therefore,

fully justiciable in the prior condemnation proceeding, but not in the fraud action.

Excelsior etc. School Dist. v. Lautrup, 269 Cal. App.2d 434, 445 (1969); and

People ex rel. Dept. of Pub. Wks. v. Lagiss, 223 Cal.App.2d 23, 39 (1963).

The *Lagiss* case involved condemnation proceedings to acquire land for alleged highway purposes. The Court of Appeal held that, although the condemnee could not contest the necessity of the public taking, it was proper to raise a defense based upon allegations that the condemnor did not actually intend to use the property as it resolved and that the true intention was to use the land for private purposes. Similarly, petitioners in the condemnation action alleged that the City did not intend to use their land for reservation purposes as stated in the ordinance, but in fact intended to sell the land to private developers for use as a hotel and office building. Petitioners overlook the fact, however, that they appropriately raised this contention in the condemnation action, introduced evidence regarding it, briefed it and had the issue decided against them. If they were unhappy with the condemnation award, they should have moved for a new trial, and filed an appeal.

2. The Issue of Public Necessity Is Non-Justiciable in a Condemnation Action Notwithstanding Allegations of Fraud on the Part of the City Council.

As stated above, Code of Civil Procedure, Section 1241, subdivision 2, renders a valid city ordinance conclusive evidence on the issue of public necessity. The issue of public necessity is a purely legislative matter which the courts will not disturb even upon

a showing that the legislative body was motivated by fraud or some other improper influence.

People v. Chevalier, 52 Cal.2d 299, 304-307 (1959); and

People ex rel. Dept. of Public Wks. v. Lagiss, 223 Cal.App.2d 23, 38 (1963).

The *Chevalier* case demonstrates that the ordinance passed by the City Council authorizing the acquisition of petitioners' land was conclusive on the issue of public necessity, notwithstanding allegations of fraud in the Council's determination. Under the *Chevalier* decision, allegation of fraud in the legislative body's determination of public necessity cannot be used as a defense in the condemnation action, and obviously cannot form the basis for direct attack on the judgment of condemnation. It follows that such allegations cannot form the basis for a collateral attack on the judgment. The policy reflected by the California Supreme Court in *Chevalier* should not be circumvented by allowing petitioners to collaterally attack the condemnation judgment by asserting indirectly matters which could not be raised in the condemnation proceedings themselves.

E. The Court of Appeal Properly Upheld the Denial of Petitioners' Motion for an Evidentiary Hearing.

In an effort to place reams of unauthenticated and inadmissible documents in the court files of this matter, petitioners filed a motion for evidentiary hearing while demurrers were pending [C.T., pp. 274-1286]. Attached as exhibits to this motion were voluminous documents going back over a long period—many before the trial of the condemnation case—allegedly supporting petitioners' claim of wrong-doing by respondents. Respondents objected to the introduction of these materials

on the grounds that it was improper to consider evidence outside the Complaint in connection with a demurrer and that there had been no authentication or foundation whatsoever [C.T., pp. 1287-1294]. It is well established under California law that a demurrer tests only the sufficiency of a complaint and may not consider matters outside the pleading.

Johnson Rancho etc. Dist. v. Yuba, 223 Cal. App.2d 681, 684 (1963);

Cravens v. Coghlan, 154 Cal.App.2d 215, 217 (1957); and

Tyree v. Epstein, 99 Cal.App.2d 361, 364 (1950).

The rule was summarized in the *Tyree* case as follows:

"There is statutory and traditional procedure for testing the sufficiency of a complaint on demurrer. It does not encompass the consideration by the court of evidentiary matters such as were here injected into the hearing . . . Procedural innovations, consisting as they usually do of attempted short cuts, seldom result in improvements over the standard procedure which our courts have followed from the beginning." 99 Cal.App.2d at 364-65.

Petitioners' motion for an evidentiary hearing was precisely the kind of procedural "innovation" referred to and rejected by the Court of Appeal in the *Tyree* case. *Ford Motor Co. v. Superior Court*, 16 Cal.App.3d 442 (1971), which petitioners cite in support of their unusual endeavor (p. 31) is inapplicable. In that case, defendant asserted the defense of collateral estoppel

in its answer and then moved for summary judgment on the issue. This motion was denied and plaintiff then moved to strike the portion of the answer alleging the defense as sham. The Court of Appeal held that the denial of defendant's motion for summary judgment did not mean that the defense could not be established, but rather was a holding that a triable issue of fact existed regarding that defense. The Court properly concluded, therefore, that defendant was entitled to later present evidence on the issue of collateral estoppel.

Petitioners have, therefore, failed to establish any precedent for an evidentiary hearing in the circumstances of the fraud case. *Hamacher v. People*, 214 Cal.App.2d 180 (1963) and *Thiriot v. Santa Clara, etc., School Dist.*, 128 Cal.App.2d 548 (1954), are direct authority that the doctrine of collateral estoppel should be applied under identical facts on demurrer without any evidentiary hearing. If petitioners had additional facts which they believed could be proven at an evidentiary hearing, they should have pleaded them in their Third Amended Complaint.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

DATED: April 7, 1977.

Respectfully submitted,

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APPENDIX A.

Order Dismissing Complaint.

United States District Court, Central District of California.

Florence Rose, et al., Plaintiffs, vs. Thomas Bradley, etc., et al., Defendants. No. CV 75-1461-DWW.

Filed: Aug. 7, 1975.

In planning for the erection of a Convention Center in the City of Los Angeles, officials of the city designated certain parcels of land as being needed for the project and proceeded to acquire that property by condemnation. The enabling ordinance designated certain of the parcels to be used for the buildings and certain contiguous parcels to provide light, air and open space in conjunction with the development. These latter parcels were designated as R-Parcels and plaintiffs were the owners of three such lots which were eventually taken by the city in the condemnation process. Plaintiffs received \$330,500.00 for their land but now contend that if they had been allowed to retain the property, its proximity to the now completed Convention facility would enable them to sell it to private investors for over one million dollars.

In their first cause of action based on 42 USC §1983 they alleged that defendants conspired to prevent them from litigating the public use question in the condemnation case by fraudulently concealing an intention to later sell the contiguous property to private developers who might profitably use the land for non-public purposes such as a hotel or trade center. It is alleged that the city planners repeatedly denied such intention while actually harboring such a plan.

In 1970, a judgment in the condemnation case became final and plaintiffs' property was taken. This action had litigated the specific issue of public use and the Court found that plaintiffs' property was being condemned for a use authorized by law. In that action plaintiffs had made the same allegations as they make here, to wit, that the city intended to sell the plaintiffs' land to private developers and had no intention of using it for "reservation" or open space purposes.

Unsatisfied, plaintiffs next filed an action in Superior Court in 1972 to recover damages for alleged fraud on the part of city officials and their agents and architects in connection with their presentation of evidence which led to the judgment in 1970 condemnation action. Plaintiffs' third amended complaint in the 1972 action (which is almost identical to the complaint filed in this §1983 action) was dismissed in the Superior Court without leave to amend. That Court agreed that the judgment in the condemnation action was res judicata in the subsequent action and that no justiciable fraud had been committed.

Plaintiffs' first claim here is that the condemnation process amounted to a deprivation of their property without due process of law. Defendants have filed a motion to dismiss pursuant to Rule 12(b) of Federal Rules of Civil Procedure and since matters outside the complaint have been presented and considered, this motion is treated as one for summary judgment. The basis of the motion is collateral estoppel and res judicata. I conclude that the motion is well-taken because the question of public use was decided on the condemnation action and the propriety of the condemnation process was decided in the fraud action.

Plaintiffs' proper remedy is in a direct appeal to the California Appellate Courts.

There are additional independent grounds for granting the motion of the City of Los Angeles to dismiss the federal §1983 claim since a municipality is not a person within the meaning of that law. *Monroe v. Pape*, 365 U.S. 167 (1961). Defendant, Mayor Bradley's motion for dismissal is also granted because the complaint does not indicate his participation in the alleged conspiracy.

The second cause of action is based upon an alleged improper expenditure of state gasoline tax funds by the city in the acquisition of the Convention Center property. Pendent jurisdiction for this cause of action is alleged. The pendent state claim is dismissed for lack of subject matter jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Judicial economy would best be served by the resolution of this state claim in the state courts where it has also been the subject of previous litigation.

The complaint is ordered dismissed and defendants are directed to submit proposed findings of fact and conclusions of law consistent with this order not later than August 22, 1975.

DATED: This 7th day of August, 1975.

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District Judge